Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-307

THE UNITED STATES OF AMERICA for the use of JOHNSTON, L. R. d/b/a L. R. JOHNSTON COMPANY,
Petitioner,

versus

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,
Respondent,

versus

BECKMAN CONSTRUCTION COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FCR
BRIEF

Supreme Court Review

Petition Filed:

Subcontracts—Miller Act--Ruling Below (CA 5; 3/23/77):

~~Subcontractor under Miller Act~~ A subcontractor furnishing the labor and materials for construction of a well under a Government prime contract who, after the first well had stopped producing water, was directed by the prime contractor to ~~fx~~ drill a second one isn't entitled to payment under the Miller Act for work performed on the second well since the Government refused to pay for the work and the subcontract did not obligate the prime to pay for any work until the prime had been paid ~~therefore~~ by the Government. Further, the sub's request for damages to its equipment that were claimed to have been caused by the negligence of the prime is one for extraordinary damages by reason of tortious conduct, rather than a claim for materials or labor, and therefore ~~xxxx~~ is not appropriate in a Miller Act suit.

Questions presented: (1) Is the subcontractor entitled to be paid under the Miller Act by the prime contract or for work and labor done under orders of the prime where the Corps of Engineers had not issued a change order of the contract for additional sums to pay for such work and labor? (2) Under the Miller Act, is a sub entitled to be paid for drilling an additional well not called for in the prime contract when the subcontract calls for $40 per hour for work and labor and machinery furnished, and when the failure of the first well was due to the negligence of the prime? ~~in failing to supply electrical power to the first well for more than one year from the time the original well was drilled and accepted by the Government and the prime contractor?~~ (3) Whether the subcontractor would be entitled to damages for the injury to machinery caused by the negligence of the prime contractor when recovery is provided for in the subcontract? (4) Whether the subcontractor would be entitled to attorneys' fees when the daily worksheets submitted by the subcontractor and signed by the prime state that the prime agrees to pay attorneys' fees in the event of default in payment of the amounts shown and where State law provides for attorneys' fees in similar contracts with the State? ~~(5) (U.S. f/u/o~~ ~~Johnston~~ (U.S. f/u/o Johnston, L.R., v. General Insurance Co. of America, Sup. Ct. No. 77-307, 8/24/77)

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No.

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GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, THE UNITED STATES OF AMERICA for the use of JOHNSTON, L. R. d/b/a L. R. JOHNSTON COMPANY, prays that a Writ of Cer-

tiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit, affirming a judgment rendered by the United States District Court for the Middle District of Alabama against your Petitioner.

OPINIONS BELOW

District Court entered a judgment on the 17th day of June, 1976 (R. 49) in favor of the Defendant, General Insurance Company of America, a corporation, and Third-Party Defendant, Beckman Construction Company, a corporation, wherein the Court ruled in its opinion that "Plaintiff take nothing by his complaint herein, and that the above-styled cause be, and the same is hereby, dismissed with costs taxed against the Plaintiff". (Appendix A) In a summary judgment, under Local Rule 21, without opinion, the United States Court of Appeals for the Fifth Circuit (case no. 76-3033) affirmed the District Court on March 23, 1977. (Appendix B) On April 27, 1977, an Order was entered by the United States Court of Appeals for the Fifth Circuit (case no. 76-3033) denying the petition for rehearing. This is not reported. (Appendix C).

The Supreme Court by Order dated the 19th day of July, 1977, extended the time to file Petition for Writ of Certiorari to and including August 25, 1977. (Appendix D)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., § 1254. The basis for federal jurisdiction in the Court of first instance, United States District Court for

the Middle District of Alabama, is that this is a case under the "Miller Act", Title 40, U.S.C., Section 270 (a), (b), (c), and (d).

STATUTES INVOLVED

The statute involved is 40 U.S.C., § 270 (a), 270 (b), 270 (c) and 270 (d). This statute is printed in Appendix G hereto (pp. 18a-22a).

QUESTIONS PRESENTED

1. Is the sub-contractor entitled to be paid under 40 U.S.C., § 270 (a), (b), (c) and (d) by the prime contractor, for work and labor done under orders of the prime contractor where the Corps of Engineers had not issued a change order or modification of the contract for additional sums to pay for such work and labor?

2. Under the "Miller Act", 40 U.S.C. § 270 (a), (b), (c), and (d), is a sub-contractor entitled to be paid for the drilling of additional water well not called for in the general contract when the contract between the prime contractor and the sub-contractor calls for $40.00 per hour for work and labor and machinery furnished, when the failure of the first well was due to the negligence of the prime contractor in failing to supply electrical power to the first well for more than one year from time original well was drilled and accepted by Corps of Engineers and prime contractor?

3. Whether under a sub-contract the sub-contractor would be entitled to damages for the injury to machinery caused by the negligence of the prime contractor when same is provided for in the sub-contract?

4. Whether the sub-contractor would be entitled to attorney fees when on the daily tickets or worksheets submitted by sub-contractor and signed by the superintendent of the prime contractor it is stated that the prime contractor agrees to pay attorney fees in the event of default in the payment of the amounts shown on the work sheets and where State law provides for attorney fees in like contracts with the State?

5. Does the sub-contractor have to wait until the Corps of Engineers agrees to a change order or modification of the original contract before being paid for work and labor performed and machinery furnished where the prime contractor authorized the sub-contractor to do the work?

STATEMENT

The basis of federal jurisdiction in the court of first instance, the United States District Court for the Middle District of Alabama is 40 U.S.C., § 270 (a), 270 (b), 270 (c) and 270 (d) dealing with a federal contract for the building of recreation facilities at Jones Bluff, Autauga County, Alabama. On the 25th day of July, 1975, the Plaintiff, United States for the use of L. R. Johnston, doing business as L. R. Johnston Company, filed a suit against the Defendant, General Insurance Company of America, as surety on the bond of Beckman Construction Company, general contractor, for work and labor performed under a sub-contract, for damages caused by the prime contractor by negligently causing injury to machinery of the Plaintiff, Johnston Company, and for attorney fees. All of said damages being sustained under a sub-contract with the Corps of Engineers for the erection or building of a

recreation center at Jones Bluff, Autauga County, Alabama. The Plaintiff, hereinafter called Johnston, claims that he entered into an agreement with the prime contractor, Beckman Construction Company, Third-Party Defendant, hereinafter called Beckman, a copy of which sub-contract is attached to the original complaint and is also Plaintiff's Exhibit 6 (R. 370); that under said contract Johnston agreed to furnish all the labor, tools, machinery, taxes and insurance to drill a water well and to drill and place grout piling and Beckman was to furnish the materials and supervision. Under Section 4 (R. 371) of the contract, Beckman agreed to pay Johnston $40.00 per hour for actual working time and the same rate for travel time, and that payments partial or final were to be made on the same basis that the owner, U. S. Corps of Engineers, hereinafter called the Corps, pays Beckman; that under the contract Corps agreed to pay Beckman each month for work completed or at more frequent intervals as determined by the contracting officer (see Section 7 (b), last page of Plaintiff's Exhibit 7 (R. 386); that under said contract Johnston did furnish the labor, tools and machinery and insurance as agreed, did drill two wells and place grout piling and that Beckman failed to pay the Plaintiff $17,003.00 due him under said sub-contract. The Plaintiff also claims attorney fees in the amount of $3,400.00. Work tickets or order tickets were issued by Johnston and signed by Beckman Company each day. (Plaintiff's Exhibits 1 and 4) (R. 310 and 348) The Plaintiff filed his claim against General Insurance Company of America, a corporation, as surety on Beckman's payment bond and the surety, with leave of the Court, brought in Beckman as Third Party Defendant.

On pre-trial hearing, the Defendant (surety) admitted that its principal (Beckman) entered into the contract sued on, admitted that it was subject to the provisions of Title 40, U.S.C., § 270 (a), et seq. and admitted that General Insurance Company was surety for Beckman Construction Company under the federal construction project referred to in the contract.

The defenses were:

1. The general issue.

2. That the contract provided that payment would not be made to Johnston until the progress on work done and services furnished was satisfactory to Beckman and that said work was not satisfactory.

3. That Johnston failed to perform work and complete all work covered by the sub-contract to the satisfaction of Beckman as provided in the contract and failed to secure and protect his work as required.

4. That Johnston was to be paid on the same basis as Beckman was paid by the Corps and that Johnston has been paid on this basis and that Beckman has no further obligation to make payment to Johnston.

5. That Johnston agreed to comply with the general contract between Beckman and the Corps of Engineers and failed to do so.

6. That the amount claimed by Johnston was the amount incurred in drilling a well which the Defendant and Corps of Engineers claimed were defective and that Plaintiff drilled another well which was approved and paid for after the first well had been declared defective.

7. Beckman claims that Johnston agreed to perform his work in a workmanlike manner which would be satisfactory to the contracting officer of the Corps of Engineers, but that the first well was not accepted by the Corps of Engineers, who refused to pay Beckman for Johnston's work done and hence Johnston is not entitled to recover.

8. Defendant says that attorney fees are not recoverable in this action.

9. That Defendant (surety) is entitled to judgment over against Beckman for any amount for which it may have to pay under its bond.

The case came on to be heard at a formal hearing before the Honorable Robert L. Varner, United States District Judge for the Middle District of Alabama, Northern Division, and all parties were represented by counsel and were given full opportunity to be heard, and a Memorandum Opinion and Judgment was rendered by the Court on the 17th day of June, 1976, by which Judgment the Court dismissed the complaint of the Plaintiff with costs taxed against Plaintiff.

The Plaintiff filed timely notice of appeal to the United States Court of Appeals, Fifth Circuit, pursuant to the rules of appellate procedure.

The United States Court of Appeals for the Fifth Circuit, in case no. 76-3033, Summary Calendar, without opinion, affirmed the lower court on March 23, 1977. Said judgment was not published.

On the 27th day of April, 1977, a petition for rehearing was denied by the United States Court of Appeals for the Fifth Circuit.

REASONS FOR ISSUING WRIT

During the entire course of the trial in the Court of first instance, the United States District Court for the Middle District of Alabama, the defense of Beckman Construction Company, Defendant, and General Insurance Company of America, Defendant, was, that since the Defendant, Beckman Construction Company, was not paid by the Corps of Engineers for the second well drilled by the Petitioner, Johnston Company, that the prime contractor, Beckman Construction Company, did not have to pay Johnston for the work done on the second well. In fact, the Court stated (R. 125) as follows:

> "THE COURT: I think your defense has not been an itemized defense. Your defense up to this point has been that you simply weren't paid by the engineers, therefore you don't owe him.
>
> MR. MILLING: Yes, sir."

Section 4 of the sub-contract (R. 371) between Appellant, Johnston and Beckman Company sets out that Johnston, the sub-contractor, was to be paid $40.00 per hour for men, machinery, work and insurance, and under Section 2 of the sub-contract (R. 370), Johnston was to drill a water well and to drill holes for piling, all of which he did in a workmanlike manner.

Also, in Section 4, the following will be found:

> "Payments, partial and final, will be made on the same basis that the owner pays Beckman Construction Company. The sub-contractor will submit an estimate of its completed work each month before the 20th of the month. If not received, Beckman Construction Company will make an estimate for this sub-contractor." (R. 371)

The entire contention of Beckman Construction Company is that the Corps of Engineers did not pay for the second well, therefore, under said paragraph of the sub-contract, Beckman was not obligated to pay the sub-contractor for doing the work.

At paragraph 7 of the prime contract with the Corps of Engineers, (R. 390) the following will be found:

> "7. (b) The government will pay progress payments monthly as the work proceeds or at more frequent intervals as determined by the contracting officer on estimates approved by the contracting officer."

Therefore, considering both paragraphs, that in the prime contract and that in the sub-contract, it is obvious that what was meant in the sub-contract is that the prime contractor would pay the sub-contractor as the government or owner paid him which was on a monthly basis on estimates of work submitted. It does not mean that if there is extra work done by the sub-contractor and the Corps of Engineers fails to issue change orders for the extra work done by the sub-contractor, then the prime contractor is not obligated to pay the sub-contractor. I do not believe that the parties understood this to be the case when they entered

into the contract. In addition, since the trial in the District Court of the Middle District of Alabama, the Corps of Engineers on appeal by Beckman ruled as follows:

> "I find that you let the well sit idle for over one year. Therefore, I find that you did not develop the well properly." (Appendix E)

So, it is plain that the engineers have ruled both at the Mobile level and at the Appellate level that the prime contractor, Beckman, was at fault in allowing a well to sit idle without electrical power and no way to activate a pump to keep said well clean for over a year, thereby allowing the well to clog and corrode and be inoperable.

The District Court held in its order or memorandum opinion that there was no order slips or daily work slips signed for the $3,600.00 for work and labor done and the use of machinery in trying to revive the first well (R. 42). Daily work slip #6770, dated 1/10/75, shows the costs and hours worked on washing and blowing the well and at the bottom states, "Cost working on well #1 $3,600.00" (R. 360). This ticket was signed by John Morgan, who was superintendent for Beckman.

As for the charge of $1,100.00 for damages negligently done by Beckman to Johnston's machinery, I refer the court to Section 21, of the sub-contract wherein it states that, "the sub-contractor shall effectually secure and protect his material and work and shall bear and be liable for all loss and/or damages of any kind in connection therewith at any time prior to the

final completion and acceptance thereof, *unless said loss or damage is caused by direct negligence of the company*". (R. 408)

As to attorney fees in "Miller Act" cases, there are many cases throughout the United States which hold that said fees are collectable. In the case of *Arnold vs. United States for the use of Bowman*, 470 F.2d. 243, (1972) the Court stated:

> "There is substantial authority for a trial court to award attorney fees in Miller Act cases if such fees are allowable by state law."

Title 50, Section 16, Code of Alabama, 1940, Recompiled 1958, provides for payment bonds on state public work projects which carries with it a provision for attorney fees (Appendix F).

In the case of *United States of America for the use and benefit of Weyerhaeuser Company vs. Bucom Construction Company and Traveler's Indemnity Company*, 430 F. 2d. 420, (1970) the Fifth Circuit Court of Appeals ruled as follows:

> "In accordance with our holding in a United States Fidelity and Guaranty Company vs. Hendry Corporation, 5th Circuit, 391 F. 2d. 13, we grant the Appellee's unopposed motion for attorney fees on this appeal pursuant to Florida statute 627.0127, as amended in 1967, E.S.A. The clerk is directed to fix said fee in the amount of $2,112.08 in taxing costs upon this appeal."

In the case of *United States vs. F. D. Rich Company*, 434 F. 2d. 855, (1970) the Court stated:

> "It was held that allowance of attorney fees against prime contractor and its surety in action under Miller Act by sub-contractor with respect to construction project in Alaska was not improper."

Therefore, we submit to the Court that attorney fees in this case is proper and should be awarded to petitioner.

Every allegation of the complaint as originally filed, which was admitted to be in good form and properly before the trial court, was proved by the Plaintiff through written exhibits and testimony and the only defense was that Beckman would pay Johnston when the Corps paid Beckman, which the Corps refused to do because Beckman was negligent in allowing the well to sit idle for more than one year (Appendix E).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted and that the judgments of the United States District Court of the Middle District of Alabama and the United States Court of Appeals for the Fifth Circuit of Alabama should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I, Maurice A. Downing, the attorney for the Petitioner herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of August, 1977, I served a copy of the foregoing Petition for Writ of Certiorari to the United States Fifth Circuit Court of Appeals on General Insurance Company of America, a corporation, and Beckman Construction Company, a corporation, Respondents herein, by mailing a copy of the same in a duly addressed envelope, with first class postage prepaid to Harry Cole and John M. Milling, Jr. of the firm of Hill, Carter, Franco, Cole and Black, at Post Office Box 116, Montgomery, Alabama 36101, Attorneys for Respondents.

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APPENDIX A

MEMORANDUM OPINION

Filed: Jun 17, 1976

In the United States District Court for
The Middle District of Alabama
Northern Division

THE UNITED STATES OF AMERICA, Etc.,
Plaintiff,
versus CA NO. 75-356-N

GENERAL INSURANCE COMPANY OF AMERICA,
A Corporation,
Defendant and
Third-Party Plaintiff,
versus

BECKMAN CONSTRUCTION COMPANY,
A Corporation,
Third-Party Defendant.

This cause being submitted for final judgment on the pleadings, evidence submitted in open Court, and briefs filed by the parties, the Court now enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

This is an action by a subcontractor [Johnston] proceeding against the surety [General Insurance] of a general contractor [Beckman] on a federal construction project in this district. Plaintiff seeks recovery of $20,503.00 from Defendant General Insurance, which sum, according to the evidence herein, consists of $15,-903.00 claimed for work done pursuant to Johnston's

contract with Beckman, $1,100.00 damages to Johnston's equipment allegedly due to Beckman's negligence, and $3,500.00 attorneys' fees.

The Court finds that Johnston knowingly entered into the contract herein attached to the complaint and that General Insurance entered into the suretyship agreement also attached to the said complaint. The Court notes that, although some of Johnston's testimony apparently attempts to suggest that he did not believe himself to be operating under the said contract, the pleadings show clearly that he is now suing solely upon that agreement as secured by the suretyship agreement. Each party has admitted the proper execution of the same.

The Court finds that sometime in 1973 Plaintiff commenced drilling a water well at the project site as called for in the aforesaid contract. On September 6, 1973, Plaintiff turned over to Beckman a producing well from which acceptable drinking water was flowing. Sometime during the following month, the Army Corps of Engineers paid Beckman for the well, and Beckman, in turn, paid Plaintiff for the same well. At some time subsequent to the payment to Plaintiff for the well, it stopped producing water in significant quantity. The evidence presented to the Court is in conflict as to the cause of this cessation of flow. Plaintiff contends it was caused by Beckman's failure to continue pumping the well after Plaintiff's departure from the job site, while Defendant claims that the well was negligently dug. For reasons stated below, the Court finds it unnecessary to decide the issue of the cause of the cessation of flow.

The Court finds that, regardless of when Plaintiff was first informed of the failure of the well, he was not asked to return to the job site until late November or December, 1974. After attempting without success to revive the flow of water from the well, Plaintiff informed Beckman that it would be necessary to partially destroy a concrete house erected by Beckman over the well, in order to perform further operations on the well. Beckman refused this plan and proposed instead that Plaintiff dig a new well. Plaintiff accepted this plan and set to work, completing the second well in 1975.

The Court finds that the contract herein calls for Plaintiff's work to be compensated at the rate of $40.00 per hour and that a practice was followed at the job site whereby during the digging of both wells Plaintiff's agent presented a ticket setting out each day's work time and charges at the end of the day, the same being accepted by Beckman through its on-the-job agent, who was supposed to sign the ticket. Plaintiff produced a series of such tickets signed by an agent of Beckman and dated from December 17, 1974, amounting to a total charge of $5,760.00. Plaintiff also claims $3,600.00 for work performed in an effort to resuscitate the first well, as to which he has produced no signed tickets and, indeed, no tickets at all. The remaining $6,543.00 of Plaintiff's claim consists of miscellaneous expenses and "rig rent" incurred at various times from December 16, 1974, until April 4, 1975, all of which the Court finds to be referrable to the drilling of the second well. None of the expenditures, except the time charges during digging of the second well, are substantiated by work tickets.

The Court finds that, at the time of the decision to drill the second well, no written authorization was obtained by Plaintiff before proceeding with the work, although, as aforesaid, Plaintiff did obtain signed work tickets each day after completion of the day's work. The Court also finds that Beckman told Plaintiff that Beckman would apply for a change order on the original contract to allow for this second well but that the Corps of Engineers rejected the application.

CONCLUSIONS OF LAW

In resolving Plaintiff's claims, the Court is mindful both that "[t]he Miller Act provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created is a matter of federal not state law," *F.D. Rich Co., Inc. v. United States for the use of Industrial Lumber Co.*, 417 U.S. 116, 127 (1974), and that the Act, being "highly remedial", should be given a liberal construction so as to give effect to the intention of Congress to give security to those who furnish materials or labor on government construction projects. *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102 (1944); *Glassell-Taylor Co. v. Magnolia Petroleum Co.*, 153 F.2d 527 (5th Cir. 1945); *Coffee v. United States ex rel Gordon*, 157 F.2d 968 (5th Cir. 1946). In order for Plaintiff to recover, however, he must prove that the charges he seeks to enforce come within the terms of the Act; the charges must be for "labor or material done or performed by him" or "furnished or supplied by him in the prosecution of the work provided for in such contract." 40 U.S.C. § 270b(a). It is particularly to be noted that the "such contract" referred to is manifestly the prime contract between the United States and the prime contractor (Beckman).

Referring to the terms of General Insurance's suretyship agreement, we find that it provides that:

> "* * * if the Principal shall promptly make payment to all persons supplying labor and materials in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the Surety(ies) being hereby waived, then the above obligation shall be void and of no effect."

Nowhere in the suretyship is any contract referred to other than the prime contract, which carried the numerical designation DACW01-73-C-0099. The Corps of Engineers explicitly declined to alter that contract to provide for the drilling of a second well. It follows, therefore, that the terms of the subcontract between Beckman and Plaintiff could not be controlling unless the charges Plaintiff seeks to recover were properly incurred under the subcontract as originally entered into or as modified.

Eleven Hundred Dollars of the sum claimed by Plaintiff is for damage to Plaintiff's equipment claimed to have been caused by the negligence or fault of Beckman. It is clear that this claim is not one for incidental damage or ordinary wear and tear. Instead, it is a claim for extraordinary damage alleged to have occurred by reason of tortious conduct by Beckman. Such a claim is not one for materials or labor, even under the most expansive reading of these terms and has no place in a Miller Act suit. *United States ex rel Gibson v. Harmon*, 192 F.2d 999 (4th Cir. 1951); *United*

States ex rel Spencer v. Massachusetts Bonding & Ins. Co., 18 F.2d 203 (6th Cir. 1927).[1]

As to Plaintiff's claim of $3,600.00 for work done in an attempt to revive the first well, it is this Court's opinion that the parties' rights are determinable under § 20 of the subcontract which provides as follows:

> "The Subcontractor shall promptly amend or make good any defective materials and/or workmanship to the entire approval and acceptance of the Owner and/or Architect or their authorized representatives. Should the Subcontractor refuse or neglect to proceed at once with the correction of rejected or defective materials and/or workmanship after receiving notice to do so, it is agreed that the Company shall have the right and power to have the defects remedied or changes made at the expense of the Subcontractor, and the Subcontractor agrees to pay to the Company on demand any and all loss and/or expense paid or incurred by the Company in remedying such defects and/or making such changes, together with interest thereon at the rate of 6% per annum until paid."

---

1 The Court expresses no opinion as to the effect of § 21 of Beckman's subcontract with Plaintiff, as follows:

> "* * * Subcontractor shall effectually secure and protect his material, and shall bear and be liable for all loss and/or damage to any kind [sic] in connection therewith * * * unless said loss or damage is caused by direct negligence of the company."

Whatever this may mean and to whatever extent this language would affect Plaintiff's right to recover in tort, it does not affect this suit. Even if this language did create a breach of contract claim in Plaintiff, which it manifestly does not, it still would not support a Miller Act recovery. *United States ex rel Edward E. Morgan Co. v. Maryland Casualty Co.*, 147 F.2d 423 (5th Cir. 1945).

It is the opinion of the Court that both Beckman and Plaintiff understood that the repairs charged herein to the value of $3,600.00 were being undertaken pursuant to this provision. There is no evidence before the Court suggesting that there was any agreement, oral or written, for the payment for repairs to the first well that would amount to a modification of the contract or the formation of a new contract, either implied or express. Particularly significant is the failure of Plaintiff to secure work tickets for this remedial work, contrasted with his careful accumulation of such tickets for work on the second well. The Court finds that Plaintiff has not met his burden of proof of establishing that these repair activities were expenditures chargeable to Beckman. Since General Insurance is surety only for Beckman, Plaintiff cannot recover these charges.

It appears to the Court that the situation with respect to charges for digging the second well may be somewhat different. The Court has found that Plaintiff and Beckman entered into an agreement for the digging and that this agreement was occasioned by Beckman's unwillingness to allow Plaintiff to proceed with repairs as required of Plaintiff by the subcontract. The Court, however, is not at liberty to award a judgment to Plaintiff herein against the surety on the basis of any new, oral contract that may have been formed or on any theory of quantum meruit. The only way in which Plaintiff can recover in this suit is on a theory that this work was called for by a binding modification of the subcontract. The Court finds it unnecessary to determine whether the agreement, in fact, created such a modification of the original subcontract for the reason that recovery on such a modified contract is clearly barred by the simple language of § 4 of the subcontract:

> "However, [Beckman] shall be under no obligation to pay Subcontractor for any work done hereunder, until [Beckman] has been paid therefor by [the Corps]." (Bracketed expressions added)

Although Plaintiff testified that this language, which the Court notes is slightly ambiguous, meant only that payment would be made on a certain schedule, the Court finds that this contention must be rejected in view of language of § 4 and of the Court's finding that Beckman informed Plaintiff that he would seek a change order to allow for the additional work. The Court is of the opinion that the preponderance of the evidence supports the conclusion that, under the contract, Plaintiff's payment was conditional on Beckman's being paid. No evidence of any modification of § 4 was introduced.

Of course, if the failure of the Corps to pay for the second well resulted from Beckman's own intentional or negligent act or failure to act, ordinary contract principles may foreclose Defendant's attempt to defend herein on the basis of the Corps' failure to pay.[2] Evidence was introduced at trial on this question, relating to the alleged failure of Beckman to transmit data concerning the first well test bore and water analysis, as required by § 2 of the subcontract. The Court, however, finds that Plaintiff has failed to meet his burden of proof as to his allegation that Beckman was the cause of the Corps' adverse decision. Plaintiff's Exhibit 7, a copy of the decision of the appropriate officer of the Corps relative to the additional

2 There may be a question whether that matter was adequately pleaded.

claim, does not support Plaintiff's contention. While the officer does state that Beckman "failed to promptly notify the Contracting Officer in writing of an allegedly differing site condition," there is no evidence that Beckman was aware of such a condition. Pages 2 and 3 of the decision would appear to implicate Plaintiff, not Beckman, as the party at fault.

The Court concludes that the terms of the written subcontract, to which Plaintiff has expressly chosen by counsel to confine this suit, do not authorize recovery of charges for the second well even if, as the Court need not decide, a valid modification of the contract ever came into existence.[3]

Since the Court has concluded that Plaintiff may not recover on any of his contract claims, it need not consider Plaintiff's claim for attorneys' fees. Such fees would be barred by the holding in *F. D. Rich Co.*, supra, at 127-131.

Judgment will enter accordingly.

DONE this 17th day of June, 1976.

/s/ R. E. VARNER
UNITED STATES
DISTRICT JUDGE

3 See *United States for the use of H. O. Kilsby v. George*, 243 F.2d 82 (5th Cir. 1957). While in *Kilsby* there was "no contract * * * as to [the] 'extras'," the fact that such a contract (i.e., a binding oral modification) may exist herein does not distinguish the present case, since the agreement, if any, contained a condition, namely that Beckman be paid, that requires the same holding as in *Kilsby*, that is that the subcontractor is barred by his agreement to be bound by the determination of the Government on the prime contract.

JUDGMENT

(Number and Title Omitted)

Filed: Jun 17, 1976

In accordance with the Memorandum Opinion entered by the Court in the above-styled cause on the 17th day of June, 1976, it is

ORDERED, ADJUDGED and DECREED by the Court that Plaintiff take nothing by his complaint herein and that the above-styled cause be, and the same is hereby, dismissed with costs taxed against the Plaintiff.

DONE this 17th day of June, 1976.

/s/ R. E. VARNER
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3033
Summary Calendar*

THE UNITED STATES OF AMERICA for the use of JOHNSTON L.R., d/b/a L.R. JOHNSTON COMPANY,
Plaintiff-Appellant,
versus

GENERAL INSURANCE COMPANY OF AMERICA,
a Corporation,
Defendant-Third Party
Plaintiff Appellee,
versus

BECKMAN CONSTRUCTION COMPANY,
a Corporation,
Third Party Defendant.

Appeal from the United States District Court for the Middle District of Alabama

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(March 23, 1977)

BEFORE GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part I.

1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX C

ON PETITION FOR REHEARING

(Number and Title Omitted)

Filed: Apr 27, 1977

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:
/s/ IRVING L. GOLDBERG
United States Circuit Judge

APPENDIX D

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Supreme Court of the United States

No. A-50

UNITED STATES FOR THE USE OF JOHNSTON, L.R. d/b/a L.R. JOHNSTON COMPANY,
Petitioner,
versus

GENERAL INSURANCE COMPANY OF AMERICA, ET AL.

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 25, 1977.

/s/ LEWIS F. POWELL
Associate Justice of the Supreme Court of the United States

Dated this 19th day of July, 1977.

APPENDIX E

Department of the Army
South Atlantic Division, Corps of Engineers
310 Title Building, 30 Pryor Street, N.W.
Atlanta, Georgia 30303

30 July, 1976

Beckman Construction Company
7201 West Vickery
Fort Worth, Texas 76116

Re: Appeal of Beckman Construction Company, Contract No. DACW01-73-C-0099, Jones Bluff Lock and Dam, Alabama, ENG BCA 3751

Gentlemen:

I have reviewed your appeal for an alleged encountering of a Differing Site Condition in the installation of a water well.

From the present record, I find no proof of a condition which would entitle you to an equitable adjustment in the contract price. In addition, I find that you let the well sit idle for over one year. Therefore, I find that you did not develop the well properly.

Since I have found no basis for reversing the Findings of Fact and decision of the Contracting Officer, it is suggested that the appeal be submitted to the Board of Contract Appeals. However, if you have additional facts or arguments which you care to present to me, I will be pleased to hear them at a mutually agreeable date.

If I do not hear from you in 20 days, I will assume you wish to have the appeal forwarded to the Board.

Sincerely yours,

/s/ KENNETH E. McINTYRE
KENNETH E. McINTYRE
Brigadier General, USA
Division Engineer

Copy furnished:
District Engineer, Mobile
(SAMOC)

I hereby certify that the foregoing is a true and correct copy of the original letter signed by BG Kenneth E. McIntyre. The underscoring has been added subsequent to signature.

/s/ LAURA R. SEAL
Notary Public, Georgia, State At Large

APPENDIX F

Tit. 50, § 16
CHAPTER 2.
Bonds of Contractors.

Sec.
16. Bonds required; suits thereon, etc.

§ 16. Bonds required; suits thereon, etc. — Any person, firm or corporation entering into a contract with the state or any county or municipal corporation or subdivision thereof in this state for the repair, construction or prosecution of any public buildings or public work, highways or bridges, shall be required, before commencing such work, to execute a performance bond, with penalty equal to fifty percent of the amount of the contract price, and in addition thereto, another bond with good and sufficient surety, payable to the state, county or municipal corporation or subdivision, letting the contract, in an amount not less than fifty percent of the contract price, with the obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor, materials, feedstuffs or supplies for or in the prosecution of the work provided for in such contract, and for the payment of reasonable attorneys' fees, incurred by successful claimants or plaintiffs in suits on said bond; and any person, firm or corporation that has furnished labor, materials, feed-stuffs or supplies for or in the prosecution or repair of any public building or public work, highways or bridges, and payment for which has not been made, shall be authorized to institute an action upon said bond in his or their name or names and to have their rights and claims adjudicated in such action and judgment

rendered thereon; provided, however, that no suit shall be instituted on said bond until after forty-five days' written notice to the surety thereon of the amount claimed to be due and of the nature of the claim. Such suit shall be commenced not later than one year from the date of final settlement of said contract. The giving of said notice by registered mail, postage prepaid, addressed to the surety at any of its places of business or offices shall be deemed sufficient hereunder. In the event the surety or contractor fails to pay such claim in full within forty-five days from the mailing of such notice, then such person or persons shall be entitled to recover of the contractor and surety, in addition to the amount of said claim, a reasonable attorney's fee, together with interest on such claim from the date of such notice. Every person or persons having a right of action on said last described bond as herein provided shall, upon written application to the authority under the direction of whom such work has been prosecuted, setting out that labor, material, feed-stuffs or supplies for such work has been supplied by him or them and that payment therefor has not been made, be promptly furnished a certified copy of said additional bond and contract. Such claimant shall be authorized to bring suit on said bond in the county in which the work provided for in said contract is to be performed, or in any county where the contractor or his surety does business, for his or their use and benefit against said contractor and his surety or either of them. In addition to any other legal mode of service, service of summons and other process in suits brought in the county where the work is let or done may be had on the contractor or the surety on the last described bond, by leaving a copy of the summons and complaint or other pleading or process,

with the director of the highway department if the contract be a state highway contract or with the executive officer of the city, town, board, commission or authority letting the contract, or charged with the payment of the contract price, if the contract be not a state highway contract. The bond last described shall have a provision binding the principal contractor and surety to the mode of service above described; and consenting that such service shall be the same as personal service on the contractor or surety. Immediately on service being made on the director of the highway department or executive office of a city, town, board, commission or authority, it will be the duty of such director or executive officer to immediately mail a copy of such process to the contractor and surety, at the address given in the bond.

This section shall not require the taking of bond to secure contracts of less than one thousand dollars in amount.

The contractor shall immediately after the completion of the contract give notice of said completion by an advertisement in some newspaper of general circulation published within the city or county wherein the work has been done for a period of four successive weeks. In no instance shall a final settlement be made upon the contract until the expiration of thirty days after the completion of same. Proof of publication of said notice shall be made by the contractor to the authority by whom the contract was made, by affidavit of the publisher and a printed copy of the notice published. If no newspaper is published in the county where the work is done, the notice may be given by posting at the court house for thirty days and proof of same shall be made by the probate judge or sheriff and the contractor. (1927, p. 37; 1935, p. 70.)

APPENDIX G

Title 40, Section 270(a), United States Code, page 397:

"(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall

be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under the Internal Revenue Code of 1954. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding

sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given."

Title 40, Section 270(b), United States Code, page 461:

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under Section 270 a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or

performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit."

Title 40, Section 270(c), United States Code, page 619.

"The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution and delivery of the original. Applicants

shall pay for such certified copies such fees as the Comptroller General fixed to cover the cost of preparation thereof."

Title 40, Section 270(d), United States Code, page 622:

"The term "person" and the masculine pronouns as used in sections 270a-270c of this title shall include all persons whether individuals, associations, copartnerships or corporations."